Daud, under which (he said and it is true) the plaintiff could redeem the land on but not after March 5, 1959. With respect we think the learned judge was in error. The plaintiff's claim is founded not on that transaction but on *another*, the transaction between the plaintiff and the *defendant* which, according to the plaintiff gives rise to a *trust* in his favour.

Whether or not the plaintiff's personal representative (the plaintiff has since died) can prove this trust is a matter of evidence, and we are of the opinion that in fairness to him this dispute should be allowed to go to trial when the parties can call whatever witnesses are available to prove or disprove the alleged trust.

We ordered that the costs of the appeal should abide the event.

Order accordingly.

Solicitors: *Datuk Wan Mustapha & Co.; Mahmood Adam & Co.*

NG LIT CHENG v. FELIXIA VARNAKULASINGHE & ANOR.

[F.C. (Gill C.J., Ong Hock Sim and Raja Azlan Shah F.JJ.) July 7, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 19 of 1976]

Probate and Administration — Sale of land belonging to estate — Order for sale made by Court — Objection by beneficiary — Bona fide purchaser for value — Effect of order by court — Service on beneficiaries.

In this case the High Court had made an order whereby leave was granted to the second respondent, the administrator of the estate of John David deceased to sell the land which was the only property of the estate to the appellant. The majority of the beneficiaries had agreed to the sale but after the order was made an objection was raised by the first appellant, who was entitled to 1/360 share in the estate. After the order had been obtained, an offer of a higher price was made. The learned trial judge set aside his order on the grounds (a) that the applicant had not disclosed a valuation of the land which had been obtained; (b) that the applicant had not disclosed a previous offer to purchase the land and (c) that the applicant had made no real attempts to locate all the beneficiaries. The appellant appealed.

Held: (1) there is no stringent rule of law or procedure that all the beneficiaries must be served, especially if they are descendants of the beneficiaries named in the will and their whereabouts are unknown, when an application is made to convert land into money for the purposes of distribution;

(2) the non-disclosure of the previous offer was neither relevant nor material, as the offer was for a little more than half the price the appellant was prepared to pay and was made not long before the order for sale was applied for;

(3) the non-disclosure of the valuation certificate was not material in view of the fact that the land was agreed to be sold at $35,000 more than it was valued;

(4) the learned judge erred in failing to hold that the appellant was a *bona fide* purchaser for value without notice of any equity in the land. Upon the approval by the court of the sale agreement the appellant's rights in the land crystallized and thereafter the appellant held the land in trust for him;

(5) there must be a clear distinction between the position of a potential purchaser from the estate of an intestate deceased whose contract can only be conditional until the court approves the sale and the position of a purchaser whose contract has already been confirmed by a court order;

(6) a breach of the rules affecting service of parties does not automatically render void an order made in the proceedings in which it occurs and it is necessary for the court subsequently passing upon it to consider the circumstances and consequences to which it relates;

(7) the offer of a much higher price after the order for sale had been passed and perfected was wholly irrelevant.

Cases referred to:-

(1) *Che Ah and Che Yang Kelsom* v. *Che Ahmad* [1941] M.L.J. 126.

(2) *Haji Saud* v. *Haji Ahmad & Anor.* [1957] M.L.J. 50.

(3) *In re Bartlett* (1880-1) 16 Ch. D. 561.

(4) *Ganapathy Chettiar* v. *Peria Karuppan Chettiar & Anor.* [1962] M.L.J. 207, 211.

FEDERAL COURT.

Stanley Ponniah (*S.F. Leow* with him) for the appellant.

C. Thambiah for the first respondent.

John Chia for the second respondent.

Gill C.J. (Malaya): This is an appeal from an order made by Ajaib Singh J. on January 8, 1976 setting aside his earlier order of November 25, 1974 whereby leave was granted to Joseph Jacob David alias Jacob Joseph as the Administrator with will annexed of the Estate of John David deceased to sell and transfer to one Ng Lit Cheng alias Ng Yam Chee for the sum of $110,000 the land comprised in Grant 953 for Lot 368 in the Mukim of Rasah, Seremban which was the only property belonging to the said estate. The said Ng Lit Cheng as the purchaser is the appellant in these proceedings.

The deceased John David died on June 29, 1920, having made a will on April 13, 1920 by which he bequeathed all his property as follows: (a) 5/16 share to his brother Francis Daniel David, (b) 4/16 share to his brother Benjamin David, (c) 3/16 share to his godson Jacob Joseph, (d) 1/32 share to R. Sinnappan brought up in the family (e) 1/16 share to his sister Elizabeth Muttama, (f) 1/16 share to his wife Mary Beatrice Thangkutti Varnakulasinghe and (g) 3/32 share to Miss Rasamma caretaker and housekeeper.

Letters of Administration with will annexed were granted to the Administrator by his attorney Dato Athi Nahappan by the High Court at Seremban on September 22, 1970. On August 5, 1974 the administrator, having earlier discharged his original attorney, appointed one E.P.E. Ananda as his attorney in Malaysia (hereinafter referred to as "the Attorney") by a duly registered power of attorney. On August 26, 1974 the said land was transmitted to the Administrator as personal representative of the said deceased pursuant to section 346 of the National Land Code 1965. On September 2, 1974 the Administrator by his Attorney executed an agreement to sell the land to Ng Lik Cheng alias Ng Yam Chee at the price of $110,000.

In pursuance of the agreement of September 2, 1974 the Administrator by his Attorney took out an *ex parte* originating summons in the High Court at Seremban on November 11, 1974 for leave to transfer the land to the purchaser. The originating summons was supported by a short affidavit of the Attorney exhibiting thereto letters from the beneficiaries of the

estate of Francis Daniel David, deceased and the sole beneficiary of the estate of Benjamin David deceased consenting to the proposed sale. The Attorney further stated in this affidavit that the land was a small piece of vacant land producing no income and that the Administrator was unable to administer the land as he resided in Sri Lanka. As I have already stated, the order granting leave to sell was made on November 25, 1974.

The application to set aside the order of sale was made by way of notice of motion dated February 7, 1975 in the same proceedings by Felixia d/o Varnakulasinghe (hereinafter referred to as "the Applicant"), who in her affidavit in support of her motion said that she was one of the five children born of Josephine Varnakulasinghe nee Ah Mooi alias Ng Fee Yin and the late Alfred Nicholas Varnakulasinghe, the son of Elizabeth Muttama who was entitled to one-sixth share in the land. Referring to the affidavit of the Attorney in support of the order for sale, she stated that both the Administrator and the Attorney ought to have been aware of her late father's interest in the land as the Administrator and her late father were cousins and had often corresponded with each other in relation to the management and sale of the land. In support of this statement she exhibited a copy of letter dated November 20, 1967 purported to have been written by the Administrator to the late Dato Athi Nahappan in which the Administrator had referred to Mr. A.N.V. Singhe of 5 Kasipillay Road, Kuala Lumpur as his cousin who had arranged the sale of the land and in which he had asked Dato Athi Nahappan whether he would act as his attorney to effect the necessary sale. She said that the Administrator and the Attorney ought to have disclosed in the affidavit in support of the originating summons her father's interest and ought to have made her father's beneficiaries parties to the application.

She also said that it was insufficient for the Attorney merely to have said in the affidavit that the devisees under the will of John David had died leaving no issue; he ought to have satisfied the court as to the steps he had taken to ascertain the beneficiaries of the devisees, their whereabouts, the dates and places of death and the reasons or the basis for the Attorney's belief that the deceased beneficiaries died intestate or died leaving no issue. She further stated that it was not sufficient merely to state the reasons for the sale of the land as it was the duty of the applicant to satisfy the court that it was in the best interest of the devisees and beneficiaries of the estate to sell the land at the price contracted for by the Attorney.

She next said that the Attorney ought to have stated whether there were other offers to purchase the land and should have supported the sale price by a qualified valuer's report. In this connection she stated that the previous attorney of the applicant had contracted with one Gan Khay Beng to sell the land at a price to be fixed by a qualified valuer subject to the approval of the court. In support of this she exhibited to her affidavit two letters dated April 17, 1974 from Dato Athi Nahappan. She further said that she believed that at the time the Attorney entered into the agreement dated September 2, 1974 the land was worth about $150,000. Lastly, she stated that the interests of some of the devisees would under the law pass to the Crown as *bona vacantia* so that the Crown should have been made a party to the Originating summons.

In opposing the notice of motion to have the order of sale set aside, the Attorney filed an affidavit dated April 1, 1975 the contents of which may be summarised as follows. He was prepared to admit for the purpose of these proceedings that Felixia was the daughter of one of the three sons of Elizabeth Muttama, although neither he nor his principal had any knowledge of it until it became known to them when she filed her affidavit. Her late father was known to his principal as a beneficiary. He had personally called at the address of the applicant's late father, but no member of the family was then residing at that address and no person living there could give any information as to the family's whereabouts. As administrator of the estate his principal was responsible for distributing to the persons beneficially entitled thereto their respective shares in the estate of the deceased. Before such distribution he would advertise for claimants to and creditors of the deceased's estate, after which the claims of those establishing their legal title to them would be paid and any unclaimed money would be deposited in court until a claim to them was established. His principal could not simply appropriate the whole money. The Applicant's contentions were based upon the mistaken view that the present proceedings were proceedings for the distribution of the estate. They were merely proceedings to obtain leave to convert immoveable property belonging to the estate into money for the purpose of subsequent distribution. It was in the best interests of the devisees and beneficiaries that the land should be sold as it produced no income and outgoings had to be met. One Gan Khay Beng made an offer to purchase the land at a price of $15,000 per acre making a total of $56,250 for the whole land. As this was much below the contracted price he saw no point in disclosing it in his affidavit in support of the application for the order of sale. As regards the sale price of the land, he had obtained a certificate from Tunku Mohamed Jamil bin Tunku Besar Burhanudin, a first class appraiser, who had valued the land at $75,000. He did not produce the certificate in court as the contract price was far in excess of that valuation and because all the known beneficiaries of the estate had consented in writing to sell all the land at the contracted price.

As regards the alleged contract with Gan Khay Beng, the Attorney said that neither he nor his principal had any knowledge of it. He denied that the value of the land at the material time was $150,000. The applicant's interest in the estate as one of her father's five children gave her 1/240 share in the land, so that her desire could not possibly prevail over the desires of the known beneficiaries who were entitled to 12/16 share of the estate. The applicant herself had stated in her affidavit that she was not opposed to the sale. Assuming that the land was sold at $150,000 her share would be $629.17 as opposed to $458.33 if the land were sold at $110,000, a difference of $170.84 which was a trifling sum.

On September 11, 1971 the purchaser Ng Lit Cheng alias Ng Yam Chee applied to intervene in the proceedings as a respondent so that he might be given an opportunity to oppose Felixia's application. By an order dated September 20, 1975 he was added as a respondent. He filed an affidavit to say that he carried out negotiations for the purchase of the land with the attorney in August 1974, that a formal agreement was executed on September 2, 1974, that he made an initial deposit of $25,000 on signing the agreement and that he spent a further sum of approximately $18,000 in having the land surveyed and developed.

Gan Khay Beng and Bee Chuan Rubber Sdn. Berhad were also allowed to intervene in the proceedings and added as second and third respondents to the proceedings. Gan Khay Beng filed an affidavit wherein he stated that the previous attorney of the administrator, the late Dato Athi Nahappan, had made a written offer to him and the company of which he was the managing director, granting them first preference to buy the land. The letter, a copy of which was exhibited to the affidavit, reads as follows:

"15th April, 1974

Mr. Gan Khay Beng,
Messrs. Bee Chuan Rubber Factory Sdn. Bhd.
No. 46 Jalan Tunku Hassan,
Seremban.

Dear Sir,

re: Estate of John David (deceased)
Land held under Grant for Land No. 953 for Lot No. 368 in the Mukim of Rasah, District of Seremban.

We are writing this on the instructions of Dato Athi Nahappan, Attorney of the Administrator of the above Estate.

We have instructions to confirm the earlier oral permission given to you by our client that you could at your own cost clear, fill, construct road, drainage, retention walls and connect water and electricity supply through the aforesaid land.

In consideration of the development of the aforesaid land as stated above and of the consequent improved value thereof we further confirm that our client had agreed to give you first preference to purchase the aforesaid land subject to the price of the aforesaid land being valued by a qualified valuer and subject to the approval of the sale in your favour by the court.

We also confirm that as soon as the issue document of title to the aforesaid land is obtained an agreement for the sale thereof will be made with you subject to the above conditions."

He said that he and the company had expended a large sum of money in developing the land in anticipation of and in consideration of being granted the first preference to buy the land, so that they had acquired an equitable interest in the land.

He also said that the order of sale dated November 25, 1974 was bad in law and irregular because (a) their prior proprietary interest was not disclosed to the court by the Attorney, (b) no proper valuation was obtained or put before the court, (c) the sale price of $110.000 was far below the market price and (d) the administrator and his attorney were at all times fully aware of the undertaking given by the previous attorney. He further said that on December 10, 1974 he forwarded a cheque for $15,000 representing 10% of the price of the land as valued by a qualified valuer named Francis A. Marsh, a copy of such report being exhibited to the affidavit.

The Attorney was cross-examined on his affidavit. In the course of his cross-examination he denied that his principal had ever told him about Gan Khay Beng being interested in the land, but he agreed that Gan Khay Beng had lodged a caveat against the land on October 9, 1974, a notice of which was sent to him before the order of sale was made and that Gan Khay Beng had filed Civil Suit No. 45/75 against the estate and the caveat had been extended by order of the court. In answer to a question that his principal was aware that Gan Khay Beng was in occupation of the land, the Attorney said that Mr. Singhe had informed his principal about it by letter dated August 15, 1968 in which he had further said that he had written to Gan Khay Beng to quit the land. He further said that Mr. Singhe had also written to Dato Athi Nahappan informing him of the trespass on the land and requesting him to ask Gan Khay Beng to quit the land.

The Applicant was also cross-examined on her affidavit. She said she was not objecting to the land being sold but only objecting to the price. She said her father's share would be 1/3 of 1/16 as the figure of 1/6 in her affidavit was wrong. As her mother was still alive she also would get her share and she herself would get her share as the eldest of the five children of her parents. When told that her share would be $305.50 if the land was sold at $110,000 and $419.04 if it was sold for $150,000, she said that she had worked out her share at about $2,000.

The Attorney filed yet another affidavit dated January 2, 1976 in which he denied that Dato Athi Nahappan ever made an offer to sell the land as alleged by Felixia, and stated that even assuming that the offer was made its validity in law was contested on the ground that the power of attorney granted to Dato Athi Nahappan gave him no authority to sell the land. He also denied that there had been any equitable interest in favour of Gan Khay Beng or the Company. The caveat by Gan Khay Beng was lodged on October 9, 1974 about which he was formally informed by the land office on November 9, 1974, but on the date of the order of sale he had no knowledge of the alleged contract between Dato Athi Nahappan and Gan Khay Beng. He further denied that on the date of the order the value of the land was below the market price. And he lastly stated that his principal was not opposed to the early disposal of all outstanding issues involving all interested parties and would not oppose a consolidation of the hearing of the Applicant's application with the hearing of Civil Suit No. 45 of 1975.

I would pause here to observe that this offer by the Attorney for the consolidation of Felixia's application with the Civil Suit should have been seriously considered by the learned judge before he decided to set aside the order of sale. The alternative perhaps was for the Civil Suit to be heard first and Felixia's application to be disposed of later, so that the question of priority of the right, if any, of Gan Khay Beng under the alleged contract over the right of Ng Lit Cheng under his duly executed contract could have been adjudicated upon. In the final analysis it was perhaps desirable for the question of priority of the alleged equitable interest of Gan Khay Beng in the land over that of Ng Lit Cheng under his contract

with the Administrator, which had in fact been approved by the court, to be decided upon. It is to be observed that the first prayer in the Civil Suit is for the sale to be set aside.

In the event, however, the learned judge chose to set aside his own order. I think it would be desirable for me to set out in full the learned judge's reasons for making that order, instead of paraphasing them. This is what the learned judge has stated in his grounds of judgment:

"I was satisfied from the evidence before me that the applicant through his attorney had failed to bring to the notice of the court all the material and relevant facts. The present attorney ought to have known through his principal that a prior offer for the sale of land had existed but this fact was not disclosed to the court. At any rate the applicant knew about this offer and it was his duty to bring this to the notice of the court. Also no valuation of the land was produced before the court although one existed which was that of Tunku Mohamed Jamil. The reason for not disclosing this valuation was that it was less than that of the purchase price of $110,000 and therefore the attorney saw no need to disclose the valuation of Tunku Mohamed Jamil. This cannot be accepted as a valid reason. It was incumbent upon the attorney to disclose the valuation report to the court whether it was more or less than the contracted price. The attorney had denied any knowledge of a prior offer to sell the land to one Gan Khay Beng but he admitted that he was aware of a caveat on the land before he himself obtained the order for sale. The caveat was lodged on October 9, 1974 and the notification thereof by the Land Office was served on the attorney on November 9, 1974. This should have put the attorney on inquiry as to the extent of the caveator's interest in the land and he should have disclosed this fact to the court before obtaining the order for the sale of the land. The attorney also admitted that he was aware that Gan Khay Beng was in occupation of the land and that he had in fact written to him about this. The attorney also agreed that Gan Khay Beng had made an offer to purchase the land at $15,000 per acre representing $56,250 but as this price was so much below the contracted price for sale he saw no point in disclosing this to the court. This offer to purchase by Gan Khay Beng should have been disclosed to the court for then upon learning that a sum of $56,250 had been offered some time previously the court would most certainly have enquired as to the present value of the land when the order for sale was made.

With regard to the beneficiaries also I came to the conclusion that the attorney made no real attempts to locate all the beneficiaries to the estate and particularly in the case of Elizabeth Muttama he failed to disclose that there were other beneficiaries of Elizabeth Muttama although on his own admission he said that he knew that she had three sons.

In all the circumstances of this case I was of the view that the attorney's application was not made in good faith and that he had failed to disclose all the material and relevant particulars as to the value of the land and as to the beneficiaries of the estate. I was of the view therefore that this was a fit and proper case where I ought to set aside the order of sale made on November 25, 1974. As attorney it was E.P.E. Ananda's duty to see that he carried out his powers in the best interests of the estate and of the beneficiaries. Having known material facts of this case as to the value of the land and the beneficiaries involved and not disclosing the same to the court he was clearly negligent in his conduct as an attorney and I ordered that costs of the proceedings to be paid personally by him. There was no reason why on account of the defaults of the attorney the estate or the beneficiaries should be punished by way of costs.

With regard to the position of Ng Lit Cheng @ Ng Yam Chee who was made a respondent in the originating summons all that can be said is that his remedy might well lie in damages against the Attorney and/or the applicant."

I regret to say, with all respect to the learned judge, that even without considering the grounds on which this appeal has been brought I find myself in complete disagreement with his reasoning.

To take first the question of the Attorney making no real attempts to locate all the beneficiaries of the estate, the attorney stated in his affidavit that he was informed and verily believed that Mary Beatrice Thankutti Varnakulasinghe and Miss Rasamah had died intestate leaving no issues, and that R. Sinnapan and Elizabeth Muttama had died intestate and their beneficiaries were not known to him. He further said that Jacob Joseph, the Administrator, was the sole surviving beneficiary from amongst the beneficiaries named under the will. He also said that at no time had his principal or himself even attempted to suggest that Elizabeth Muttama left no heirs or to suggest that her heirs had no interest in the land. He further said that as regards the applicant, her late father was known to his principal as being a beneficiary but he had died in 1970 before the originating summons for the sale of the land was filed. He had personally called at No. 5 Jalan Kasipillay, Kuala Lumpur, the last known address of the applicant's father, but no member of the family was then residing at that address and there was no person living there who could give any information as to the family's whereabouts.

It is to be observed that the beneficiaries of the deceased estate entitled to 12/16 share of the estate had signed letters of consent for the land to be sold at $110,000. With respect, what the learned judge apparently overlooked was the fact that the application by the administrator was for the sale of the only asset belonging to the estate and not for distribution of the estate which is an entirely different matter. As the Attorney stated in his affidavit in opposing the application for the setting aside of the order of sale, the question of ascertaining the whereabouts of the beneficiaries would only arise when the time came for the estate to be distributed and that in the event of any of the beneficiaries being untraced their shares would be deposited in court.

I do not think there is any stringent rule of law or procedure that all beneficiaries must be served, especially if they are descendants of the beneficiaries named in the will and their whereabouts are unknown, when an application is made to court for leave to convert land into money for purposes of distribution. The applicant Felixia after all is entitled to only 1/360th share in the estate which at its highest value comes to nothing more than $400. In my judgment it was unjust to set aside the order on her application in view of the fact that the purchaser had made a deposit of $25,000 even before the order had been perfected.

As regards the failure of the Attorney to disclose the offer made by Gan Khay Beng to purchase the land for $56,250 I do not see how such no-disclosure was either relevant or material. The offer was a little more than half the price which the appellant agreed to pay. This offer was made not long before the order for sale was applied for. It came from a man who after the order for sale had been made and perfected, came along with an offer of $150,000. It is true that he produced a valuer's certificate but obviously he obtained this certificate solely for the purpose of these proceedings in an attempt to get the land at any price, as he had been making use of the

land, as a trespasser according to the administrator and his Attorney, but by virtue of an alleged contract according to his contention. The court was here faced on the one hand with the claim of a purchaser who had paid a deposit and had had his contract approved by the court and a man who relied on some sort of undertaking allegedly given to him by the previous attorney of the administrator for sale of the land to him. Whether this previous attorney had the power to give an undertaking or to enter into any contract for sale of the land was gravely in doubt. At any rate, even assuming that there was this so-called contract, at the highest it was no more than an undertaking to enter into a conditional contract.

The land in question was valued by Tunku Mohamed Jamil at $75,000 on August 29, 1974. The contract for the sale of the land to the appellant was entered into five days later. The application to the court for the order of sale was made on November 11, 1974. In the circumstances can it be said that the non-disclosure of the valuation certificate was in any way material? I do not think so, considering the fact that the land was agreed to be sold at $35,000 more than the amount at which it was valued by a first class apprasier only five days earlier. Clearly the Attorney had no personal interest in the matter. In all the circumstances of the case I do not think I can agree with the learned judge's view that the Attorney's application was not made in good faith.

In view of what I have stated above I do no think it necessary to consider in detail the grounds on which the purchaser as appellant has brought this appeal. The order setting aside the sale was made on the application of Felixia whom I have referred to so far as the applicant, but she had been cited as the first respondent to this appeal and the administrator has been cited as the second respondent.

One of the grounds of appeal is that the learned judge erred in fact in failing to hold that the appellant was a bona fide purchaser for value without notice of any equity in the land. I think there is considerable merit in this ground. It is also to be remembered that the appellant had paid the deposit of $25,000 even before the order of sale was approved and his story that he had expended a great deal of money in improving the land before and after the order of sale was not challenged. I am also inclined to agree with the contention on behalf of the appellant that upon the approval by the court of the sale agreement the appellant's rights in the land crystallized and that the administrator thereafter held the land in trust for him. It was further contended on behalf of the appellant that the proprietary rights which he had thus acquired could not be taken away except by way of a fresh suit instituted for that purpose. Gan Khay Beng and Bee Chuan Rubber Factory Sendirian Berhad, who were allowed to intervene in the proceedings, had in fact filed a civil suit for that purpose before the order setting aside the sale was made. I am therefore of the opinion that the order appealed from should not have been made pending the trial of that civil suit.

Gan Khay Beng and Bee Chuan are not parties to these proceedings. Counsel for the first respondent to this appeal handed in written submissions. I do not think I need consider such submissions in detail. The two authorities relied upon by counsel for the respondent are the cases of *Che Ah and Che Yang Kelsom* v. *Che Ahmad*[1] and *Haji Saud* v. *Haji Ahmad & Anor.*[2] In the first case it was held that it was not for the court to consider the interest of the purchaser who should be well aware of the risks he runs in entering into a conditional contract. In the second case it was held that an administrator can enter into an agreement for the sale of immoveable property but the agreement is unenforceable unless the permission of the court is obtained. I do not think these cases are relevant in this case because they speak of the position of a purchaser before the court has made the order. There must be a clear distinction between the position of a potential purchaser from the estate of an intestate deceased whose contract can only be conditional until the court approves the sale and the position of a purchaser whose contract has already been confirmed by a court order.

I need hardly say that the intervention by Gan Khay Beng and Bee Chuan Rubber Factory Sendirian Berhad in the proceedings for the setting aside of the sale would by itself have been of no consequence. I am therefore compelled to say that the learned judge misdirected himself in taking into consideration the non-disclosure by the Attorney of their offer to purchase the land at $56,250 and their alleged contract with the previous attorney for the setting aside the order of sale. I must assume that the only ground on which the order of sale could have been possibly set aside was that the originating summons was not served on Felixia. It is to be observed that she herself produced no evidence whatsoever as to the value of the land being higher than $110,000. The offer of a much higher price by Gan Khay Beng after the order of sale had been passed and perfected was wholly irrelevant. (See *In re Bartlett*[3]).

In *Ganapathy Chettiar* v. *Periakaruppan Chettiar & Anor.*[4] Lord Radcliffe in delivering the judgment of their Lordships of the Privy Council said:

> "A breach of the rules affecting service of parties does not automatically render void an order made in the proceedings in which it occurs and it is necessary for the court subsequently passing upon it to consider the circumstances and consequences to which it relates."

Bearing that principle in mind and having regard to the circumstances of this case and the consequences of the order appealed from, I am of the opinion that the order of sale was wrongly set aside. I would therefore allow this appeal setting aside the order appealed from and restoring the order of sale. The first respondent must pay the appellant's costs of this appeal. She must also pay the costs of the second respondent who is but a nominal party to these proceedings and has not contested the appeal.

As regards the order of costs made in the court below there is a separate appeal, being appeal No. 48 of 1976. They will therefore be considered separately in determining that appeal.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Appeal allowed.

Solicitors: *Stanley Ponniah, Ng & Soo; Chellappan Thambiah; Chen & Chia.*